



## **BACKGROUND**

### **I. United States Policy on Holocaust Claims**

The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era has consistently been motivated by the twin concerns of justice and urgency. *See* Ex. 2 ¶¶ 3, 29; Ex. 7 ¶ 3, 30.<sup>2</sup> Of course, no amount of money could provide compensation for the suffering that the victims of Nazi-era atrocities endured. Nevertheless, the moral imperative has been and continues to be to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes. Ex. 2 ¶ 3; Ex. 7 ¶ 3. Today, more than 65 years after the Holocaust, the survivors are elderly. The United States has thus advocated that concerned parties, foreign governments, and non-governmental organizations act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation. Ex. 2 ¶¶ 3, 29; Ex. 7 ¶ 3, 30. To this end, the United States has been successful in facilitating several international settlements which have provided approximately \$ 8 billion dollars for the benefit of victims of the Holocaust.

Two examples of the successful implementation of this United States policy are relevant here: (1) the German Foundation, and (2) the Austrian General Settlement Fund (“GSF”). The

---

<sup>2</sup> Exhibits 2 and 7 are declarations signed by then-Deputy Secretary of Treasury Stuart Eizenstat in 2000 for use in various cases pending against German and/or Austrian companies. The United States still considers these declarations to be an accurate and useful first-hand account of the proceedings leading up to the relevant agreements with Germany and Austria. *See* Ex. 1 ¶ 2; Ex. 6 ¶ 2. In order to make the United States’ Appendix easier to follow, the Eizenstat Declarations are submitted here without their original exhibits. The most relevant of these exhibits are contained elsewhere in the Appendix. *See* Ex. 5; Ex. 10; Ex. 11.

German Foundation was capitalized with €5.2 billion from the Federal Republic of Germany and German companies and was “to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.” Ex. 5, Art. 1(1). The GSF was created to provide a potential remedy for all victims with Nazi-era claims against Austria and/or Austrian companies not covered by the Austrian Fund “Reconciliation, Peace and Cooperation” (“Reconciliation Fund”), excluding those with claims for *in rem* restitution of works of art. Ex. 7 ¶¶ 29-31. The GSF was capitalized with \$210 million (plus interest) from the Austrian Federal Government and Austrian companies in order to make payments for claims against Austria and/or Austrian companies arising out of or relating to the National Socialist Era or World War II. *Id.* ¶ 17.

The United States pledged its support for the agreements which created these funds by, *inter alia*, pledging to help achieve legal peace for German and Austrian companies with respect to Nazi-era claims in U.S. courts. Ex. 2 ¶ 8; Ex. 7 ¶ 10. These promises of assistance in attaining legal peace were essential to these agreements and other similar agreements that have resulted in substantial recovery for the benefit of Holocaust survivors. *See* Ex. 2 ¶ 37; Ex. 7 ¶ 38.

## **II. The German Fund**

### **A. The Negotiations Leading to the Creation of the German Foundation**

In the Fall of 1998, then-Under Secretary of State Stuart E. Eizenstat was asked by the German Government to help facilitate a resolution of class action lawsuits filed in U.S. courts arising from slave and forced labor during the Nazi era. Ex. 2 ¶ 5. During the subsequent year and a half, Eizenstat (who, in 1999, became Deputy Treasury Secretary) co-chaired a series of formal and informal discussions among lawyers representing victims, lawyers for German

companies, and the German Government on a proposed initiative to establish a foundation to make payments to victims of slave and forced labor as well as all others who suffered at the hands of German companies during the Nazi era. *Id.*

A number of other participants were involved in the negotiations, including the State of Israel, the governments of five Central and East European countries (Belarus, the Czech Republic, Poland, Russia, and Ukraine), and the Conference on Jewish Material Claims Against Germany, a non-governmental organization created to negotiate for and administer compensation for Nazi crimes to Jewish people around the world.<sup>3</sup> *Id.* ¶ 6. Through these participants and the numerous plaintiffs' attorneys, the victims' interests were broadly and vigorously represented. *Id.*

The initiative was publicly announced on February 16, 1999 by German Chancellor Gerhard Schroeder and a group of German companies that had conceived the initiative. *Id.* ¶ 7. In December 1999, following the personal involvement of the President of the United States and of Chancellor Schroeder, the negotiations reached a major breakthrough. *Id.* ¶ 8. The parties agreed on two key points: that the German Government and companies would establish a foundation, capitalized by 10 billion German Marks, to make payments to forced laborers and others who suffered at the hands of German companies during the Nazi era and World War II, and that, in exchange, the plaintiffs would voluntarily dismiss their lawsuits against German

---

<sup>3</sup> The Conference on Jewish Material Claims against Germany ("CJMC") is an umbrella organization under which various Jewish groups and organizations of Holocaust survivors are represented. Among the participating groups and organizations are the American Gathering/Federation of Jewish Holocaust Survivors, the American Jewish Committee, the American Jewish Congress, B'nai B'rith International, the Centre of Organizations of Holocaust Survivors in Israel, and the World Jewish Congress. *Id.* ¶ 6 n.1.

companies asserting claims arising out of the Nazi era and World War II. *Id.* The United States Government further agreed to support this effort by filing Statements of Interest in pending lawsuits describing the United States' foreign policy interests that would be served by dismissal. *Id.*

The parties agreed on detailed eligibility requirements and other procedures to govern the Foundation's operation. *Id.* ¶ 9. The parties also came to agreement on precise allocations of the Foundation capital to compensate various types of injuries, and on payment levels for individual victims, described below. *Id.* These agreements were incorporated into draft legislation being prepared by the German Government to establish the Foundation. *Id.*

In July 2000, the German Parliament passed a law creating the Foundation. *Id.* ¶ 11. On July 17, 2000, the parties to the negotiations gathered in Berlin to sign a Joint Statement concluding the negotiations, and expressing their support for the Foundation. *Id.* ¶ 12. Simultaneously, the United States and Germany signed an Executive Agreement, in which Germany committed that the operation of the Foundation would be governed by principles agreed to by the parties to the negotiations, and the United States committed to take certain steps to assist German companies in achieving "legal peace" in the United States for claims arising out of the Nazi era. *Id.* ¶ 12; Ex. 5.

On August 12, 2000, the law creating the Foundation was promulgated and entered into effect. Ex. 2 ¶ 13. On October 19, 2000, the United States and German Governments exchanged diplomatic notes stipulating, in accordance with Article 5 of the Executive Agreement, that the agreement had entered into force. *Id.*

The role played by the United States in this negotiation was crucial and unusual. The Executive Agreement negotiated is not a government-to-government claims settlement agreement, and the United States has not extinguished the claims of its nationals or anyone else. Instead, the intent of the United States' participation was to bring together the victims' constituencies on one side and the German Government and companies on the other to bring expeditious justice to the widest possible population of survivors, and to help facilitate legal closure. *Id.* ¶ 14. Among these parties, the United States facilitated the essential arrangement by which the German side would establish a DM 10 billion foundation to compensate categories of Nazi era and World War II victims, and the class action representatives in pending United States litigation agreed to give up their claims, by voluntary dismissals with respect to plaintiffs in cases in United States courts. *Id.* The United States further contributed its own commitment to advise American courts of its foreign policy interests, described below, in the Foundation being treated as the exclusive remedy for World War II and Nazi era claims against German companies, and, concomitantly, in current and future litigation being dismissed. *Id.*

**B. Benefits and Operations of the German Foundation**

As established under German law, the Foundation made payments to persons who suffered harm due to the conduct of German companies during the Nazi era. *Id.* ¶ 15. The Foundation took steps to ensure that all eligible applicants worldwide were notified of its existence and their opportunity to apply for benefits. *Id.* ¶ 24. First, the Foundation's creation in July 2000 received extensive publicity around the world. *Id.* Second, the Foundation worked in conjunction with its partner organizations to create application forms to be mailed to extensive, existing lists of potentially eligible individuals. *Id.* Third, each partner organization

implemented a plan for publicity designed to reach the maximum number of potentially eligible individuals. *Id.* The application process was short, simple, and non-bureaucratic. *Id.* ¶ 25. Determinations of eligibility were made on relaxed standards of proof, and the process was non-adversarial. *Id.* Each partner organization was required to set up an independent and free appeals process. *Id.*

Since the signing of the German Foundation Agreement, Germany has paid out nearly €5 billion to approximately 1.6 million victims of Nazi atrocities. Ex. 4 ¶ 3. The total amount of money paid by the German public sector to Nazi victims since World War II has reached approximately €66 billion. *Id.* The German Foundation has paid out €4.5 billion to 1.6 million forced and slave laborers; €54 million for other personal injuries; €89 million for property claims; and €281 million for insurance claims and related humanitarian payments. *Id.* ¶ 4. The German Foundation Agreement also endowed a €358 million “Future Fund” that continues to operate, providing benefits to surviving victims and helping to ensure that the crimes of the Holocaust are never forgotten. *Id.*

### **III. The Austrian General Settlement Fund**

#### **A. The Negotiations Leading to Creation of the GSF**

In February 2000, the Austrian Federal Government asked Eizenstat to help facilitate a resolution of class action lawsuits filed in U.S. courts arising from slave and forced labor on the territory of the present-day Republic of Austria during the Nazi era. Ex. 7 ¶ 5. During the subsequent nine months, Eizenstat co-chaired a series of formal and informal discussions among representatives of the victims, including plaintiffs’ attorneys, and the Austrian Federal Government on a proposed initiative to establish a fund to make payments to Nazi-era victims of

slave and forced labor on the territory of the present-day Republic of Austria. *Id.* ¶ 5. The parties' intent was to model this fund on the German Foundation. *See id.*

The parties to these negotiations anticipated that, at the conclusion of an agreement concerning the establishment of a fund for Nazi-era forced and slave laborers who worked on the territory of the present-day Republic of Austria, the parties would commence negotiations concerning the establishment of a similar fund for Holocaust victims with claims against Austria and/or Austrian companies concerning the aryanization, theft, or destruction of property during this same time period. *Id.* ¶ 6. In early October 2000, Austria committed \$150 million to be paid on an expedited, per-capita basis to survivors of the Holocaust originating from or living in Austria for claims for apartment and small business leases, household property, and personal effects, excluding *in rem* claims for works of art and potential claims against the Dorotheum.<sup>4</sup> *Id.* ¶ 7.

On October 24, 2000, the parties to the negotiations gathered in Vienna to sign a Joint Statement concluding the negotiations, and expressing their support for the Reconciliation Fund as the exclusive remedy for all Nazi-era forced and slave labor claims against Austria and/or Austrian companies on the territory of the present-day Republic of Austria. *Id.* ¶ 8. Simultaneously, the United States and Austria signed an Executive Agreement, in which Austria committed that the operation of the Reconciliation Fund would be governed by principles agreed to by the parties to the negotiations, and the United States committed to take certain steps to assist Austria and Austrian companies in achieving "legal peace" in the United States with

---

<sup>4</sup> The Dorotheum is an auction house in Vienna through which property aryanized during the National Socialist Era and World War II was sold. *Id.* ¶ 7 n.1.



respect to Nazi-era forced and slave labor claims (and any other claims covered by the Reconciliation Fund). *Id.*; Ex. 10. The Executive Agreement entered into force by exchange of notes between the Austrian Federal Government and the United States Government on December 1, 2000. Ex. 2 ¶ 8.

After being publically announced earlier that day by Austrian Chancellor Wolfgang Schuessel, negotiations commenced in Vienna during the evening of October 24, 2000 concerning the creation of the GSF to address all Nazi-era property claims against Austria and Austrian companies, and all other Nazi-era claims against Austria and Austrian companies not covered by the Reconciliation Fund, excluding claims for the *in rem* restitution of works of art. *Id.* ¶ 9. Eizenstat co-chaired these negotiations with Austrian Ambassador Ernst Sucharipa, the Austrian Special Envoy for Restitution Issues. *Id.* The participants in these negotiations included the United States, the Austrian Federal Government, Austrian companies, and representatives of the victims, including the Conference on Jewish Material Claims. *Id.* Through these participants and the numerous plaintiffs' attorneys, the interests of victims were broadly and vigorously represented. *Id.*

In January 2001, Austria, Austrian companies, and the great majority of plaintiffs' attorneys agreed on two key points: that the Austrian Federal Government and Austrian companies would establish a fund to make payments for all claims against Austria and/or Austrian companies arising out of or relating to the National Socialist Era or World War II, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund, and that, in exchange, the plaintiffs would voluntarily dismiss all such claims filed in U.S. courts. *Id.* ¶ 10. The United States Government further pledged to support

this effort by filing a Statement of Interest indicating its own foreign policy interests in assisting Holocaust victims on an expedited basis, and in helping achieve legal peace for Austria and Austrian companies with respect to Nazi-era property claims (and any other claims covered by the GSF) in American courts. *Id.* The parties agreed on eligibility requirements and other procedures to govern the GSF's operation as well as on the levels of capital distribution among and evidentiary standards for different varieties of property claims. *Id.* ¶ 11.

On January 17, 2001, the parties to the negotiations gathered in Washington to sign a Joint Statement concluding the negotiations, and expressing their support for the GSF as the exclusive remedy for all Nazi-era claims against Austria and Austrian companies (excluding claims for *in rem* restitution of works of art and claims covered by the Reconciliation Fund). *Id.* ¶ 13; Ex. 11. The agreement among the parties took effect on January 23, 2001, when the United States and Austria exchanged diplomatic notes expressing Austria's commitment that the operation of the GSF would be governed by principles the parties agreed upon during the negotiations, including the Austrian Federal Government's obligation to propose legislation establishing the GSF (including a Claims Committee and an *in rem* Arbitration Panel) and to amend various social benefits laws, and the United States' commitment to take certain steps to assist Austria and Austrian companies in achieving "legal peace" in the United States with respect to all Nazi-era claims against Austria and/or Austrian companies, excluding claims for *in rem* restitution of works of art. Ex. 7 ¶ 14; Ex. 11.<sup>5</sup>

---

<sup>5</sup> The Exchange of Notes of January 23, 2001, constitutes an executive agreement between the United States Government and the Austrian Federal Government.

The role played by the United States in this negotiation – like the role it played in the negotiation leading to the creation of the Reconciliation Fund, the German Foundation, and the fund established to provide payments for those who suffered losses at the hands of French banks during World War II – was crucial. As with the German Foundation, the agreements concerning the GSF are not government-to-government claims settlement agreements, and the United States has not extinguished any claims. Ex. 7 ¶ 15. Instead, as with the German Foundation, the intent of the United States’ participation was to bring together the victims’ constituencies on one side and the Austrian Federal Government and Austrian companies on the other, to bring a measure of expeditious justice to the widest possible population of survivors and heirs, and to help facilitate legal peace with respect to Nazi-era property claims against Austria and Austrian companies, and any other claims (excluding claims for *in rem* restitution for works of art) not covered by the earlier Reconciliation Fund. *Id.*

Among these parties, the United States facilitated the essential arrangement by which the Austrian side would establish a fund to address all Nazi-era claims against Austria and/or Austrian companies, with the exception of those claims covered by the Reconciliation Fund and claims for the *in rem* restitution of works of art, and the class action representatives in pending United States litigation agreed to give up their Nazi-era property claims against Austria and/or Austrian companies (and any other claims covered by the GSF), by voluntary dismissals with respect to such claims in United States courts. *Id.* The United States further contributed its own commitment to advise American courts of its foreign policy interests, described in detail below, in the GSF being treated as the exclusive remedy for all claims against Austria and/or Austrian

companies arising out of or relating to the National Socialist Era or World War II (excluding claims for *in rem* restitution of works of art and claims covered by the Reconciliation Fund). *Id.*

**B. Benefits and Operation of the GSF**

The GSF benefitted victims of Nazi-era persecution, including heirs and victims' communal organizations. It was capitalized with \$ 210 million, plus interest. *Id.* ¶ 17. The GSF legislation established an independent three-member Claims Committee ("Committee") for Nazi-era claims against Austria and/or Austrian companies, including claims against defunct companies and companies not subject to jurisdiction in U.S. courts. *Id.* ¶ 18. The United States and Austria each appointed one member of the Committee; these two members then appointed a Chairperson. *Id.*

The GSF legislation provided that 50% of the funds allocated for distribution from the GSF would be reserved for a "claims-based" process and 50% of such funds reserved for an "equity-based" process. *Id.* ¶ 19; Ex. 11 Annex A, ¶ 2.b. The GSF distributed the funds allocated for the "claims-based" process on a pro-rata basis and the funds allocated for the "equity-based" process on a per-household basis. Ex. 7 ¶ 19; Ex. 11 Annex A, ¶ 2.b. Each claimant was permitted to submit an application to the Committee either under the "claims-based" process (which claim may include multiple properties) or under the "equity-based" process. Ex. 7 ¶ 19; Ex. 11 Annex A, ¶ 2.h. If an entire claim was rejected under the "claims-based" process, the claimant was permitted to submit an application under the "equity-based" process. *Id.* The claims period for both the "claims-based" and the "equity-based" processes extended for two years beginning on June 6, 2001, the date the GSF law entered into force. Ex. 7 ¶ 19; Ex. 11 Annex A, ¶ 2.i.

The GSF legislation required the Committee to establish simplified procedures. The Committee reviewed all applications using relaxed standards of proof, and made all decisions on a majority basis, except those concerning the reopening of cases that had been finally decided by an Austrian court or administrative body under Austrian restitution legislation or that had been settled after 1945, in which cases the Committee was permitted to award payments only where it unanimously determined that such decision or settlement constituted extreme injustice. Ex. 7 ¶ 20; Ex. 11 Annex A, ¶ 2.f.-g.

Pursuant to the “claims-based” process, the Committee was permitted to receive claims for the following categories of property: (i) liquidated business, including licenses and other business assets; (ii) real property; (iii) bank accounts, stocks, bonds, and mortgages; (iv) moveable property not covered by the \$150 million provided for in the Framework for Holocaust survivors' apartment and small business leases, household property, and personal effects; and (v) insurance policies. Ex. 7 ¶ 21; Ex. 11 Annex A, ¶ 2.f. Under the “claims-based process,” the Committee was permitted to award a payment of no more than \$2 million for any approved claim. Ex. 7 ¶ 21; Ex. 11 Annex A, ¶ 2.f.

Pursuant to the “equity-based” process, the Committee made per-household payments for the categories of property covered by the “claims-based” process (using even more relaxed standards of proof than the “claims-based” process) or any Nazi-era claims not covered by the Reconciliation Fund. Ex. 7 ¶ 22; Ex. 11 Annex A, ¶ 2.g. The Committee was permitted to award no more than one “equity-based” payment per household. *Id.*

In connection with the establishment of the GSF, the Austrian Federal Government enacted legislation establishing, funding, and authorizing a three-member Arbitration Panel

(“Panel”) to consider, on a case-by-case basis, the *in rem* return of publicly-owned property, including property formerly owned by Jewish communal organizations. Ex. 7 ¶ 24; Ex. 11 Annex A, ¶ 3. The United States, with prior consultation with the victims’ representatives, and Austria each appointed one member of the Panel; these two members then appointed a Chairperson. *Id.* Potential claimants for *in rem* restitution of publicly-owned property included survivors, heirs, and victims’ communal organizations. Ex. 7 ¶ 24; Ex. 11 Annex A, ¶ 3. The Panel made recommendations to the competent Austrian Federal Minister for *in rem* restitution. Ex. 7 ¶ 24; Ex. 11 Annex A, ¶ 3. As agreed to in the Exchange of Notes of January 17, 2001, *see* Ex. 11 Annex A, ¶ 3.j, on January 31, 2001, the Austrian Parliament passed a resolution indicating its expectation that the Panel’s recommendations would be approved by the appropriate Austrian Federal Minister. The GSF legislation required that the GSF, in conjunction with the Austrian National Fund, provide extensive publicity concerning the benefits that the GSF offered and the procedures for applying for such benefits. Ex. 4 ¶ 27; Ex. 11 Annex A, ¶ 2.1.<sup>6</sup>

The GSF has been successfully implemented. As the Department of State’s Special Envoy for Holocaust Issues observes, “the Austrian National Fund has undertaken very thorough work to implement the General Settlement Fund agreement.” Ex. 9 ¶ 4. 96% of Austria’s \$210 million contribution to the GSF has been distributed to approximately 19,000 beneficiaries, and the United States expects that when the GSF is concluded, approximately 24,000 individuals

---

<sup>6</sup> In addition, on June 6, 2001, the Austrian Federal Government amended certain pension and social benefits laws to assist victims of National Socialism. Ex. 7 ¶ 25; Ex. 11 Annex A, ¶ 4. Austria’s health service paid out €115 million between 2002 and 2009 to cover increased nursing home care benefits. Ex. 9 ¶ 3.

from over 75 countries will have received payment. *Id.* ¶ 3. Additionally, the GSF's arbitration process has returned property valued in excess of €40 million. *Id.*

#### **IV. This Litigation**

The case before this Court is a putative class action brought on behalf of “victims of bank theft in Greater Hungary<sup>7</sup> in 1944, or their heirs or next of kin,” seeking an accounting and recovery for “cash, records, art, jewelry, bank deposits, securities, and all other businesses, titles to real estate, and personal assets wrongfully taken and withheld from them and their families.” Amen. Compl., at 2.<sup>8</sup> The amended complaint, filed on December 15, 2010, contains six causes of action. *See id.* at 41-45. Count 1 is entitled “genocide,” and alleges that “[t]he predecessors in interest of defendant banks willfully and knowingly participated in the aspect of the Nazi genocidal plan requiring the financial destruction and devastation of the Hungarian Jewish community.” Count 2 alleges aiding and abetting genocide. Count 3 is entitled “bailment.” Count 4 alleges conversion. Count 5 alleges constructive trust. And Count 6 seeks an accounting.

The complaint names five defendants. One defendant is Erste Group Bank AG, an Austrian bank. The United States has concluded that Erste Group is an “Austrian company” as

---

<sup>7</sup> The term “Greater Hungary” refers to the territory controlled by Hungary in 1944, and includes the legally recognized territory of Hungary as well as territories that were illegally annexed by Hungary during World War II. These annexed territories, taken between 1939 and 1941 from Czechoslovakia, Romania, and Yugoslavia, had previously been part of the Kingdom of Hungary (itself a constituent part of the Austro-Hungarian Empire) prior to World War I. Hungary's borders were redrawn, and its territory diminished, by the Treaty of Trianon in 1920. The smaller territory is known as “Trianon Hungary.”

<sup>8</sup> The use of banks by the Hungarian government to steal vast amounts of wealth from its Jewish citizens during World War II is described in Professor Ronald W. Zweig's seminal book, *The Gold Train: The Destruction of the Jews and the Looting of Hungary* (2002).

defined by Annex B to the Joint Statement and Exchange of Notes Between the United States and Austria Concerning the Establishment of the General Settlement Fund for Nazi-Era and World War II Claims, and thus that maintenance of this suit against Erste Group runs contrary to the GSF's goal of "legal closure" and to enduring United States foreign policy interests.

*See* Ex. 11 Annex A, ¶ 10.

A second defendant is MKB Bank. While MKB Bank is a Hungarian bank, the United States has concluded that it qualifies as a "German company," as defined by Annex C to the German Agreement, because MKB Bank was during the relevant time period (and still is) more than 25% owned by a German parent company (Bayerische Landesbank). *See* Ex. 5 Annex C (defining the term "German companies" to encompass all "[e]nterprises that had their headquarters within the 1937 borders of the German Reich or that have their headquarters in the Federal Republic of Germany" and all "[e]nterprises situated outside the 1937 borders of the German Reich in which during the period between January 30, 1933, and the entry into force of the legislation establishing [the German Foundation], German enterprises . . . had a direct or indirect financial participation of at least 25 percent"). The maintenance of the suit against MKB Bank thus runs counter to the German Foundation Agreement's goal of "legal peace" and to United States foreign policy interests.



**ARGUMENT**

**DISMISSAL OF THE CLAIMS AGAINST ERSTE BANK  
GROUP A.G. AND MKB BANK IN THIS ACTION WOULD BE IN  
THE FOREIGN POLICY INTEREST OF THE UNITED STATES**

The German Foundation and the GSF are examples of the successful implementation of the United States Government's policy goal to obtain some measure of justice for the victims of the Holocaust within their remaining lifetimes. The United States believes that the best means to accomplish this goal is through dialogue, negotiation, and cooperation between concerned parties, foreign governments, and non-governmental organizations, rather than litigation. Although the agreements setting up the German Foundation and the GSF are not claims settlement agreements, they are nonetheless aimed at achieving legal closure for German and Austrian companies with respect to claims arising out of World War II and the Nazi era, and to facilitate the agreements, the United States agreed to support the goal of legal closure for German and Austrian companies by filing Statements of Interest in cases where claims are brought against a German or Austrian company setting forth the significant United States foreign policy interests favoring dismissal of the claims. Ex. 5 Art. 2 (noting that one of "the objectives of this agreement" recognized by the United States is "all-embracing and enduring legal peace"); Ex. 11 Annex A, ¶ 10 (entitled "Legal Closure"). Ex. 5 Art. 2; Ex. 11 Annex A, ¶ 10.

To that end, the Austrian Government and Austrian companies insisted that, as a precondition to the GSF making payments to any victims, all pending litigation in the United States involving such claims against Austrian companies would first have to be dismissed. The German Government and German companies likewise insisted in the dismissal of all pending litigation in the United States in which Nazi era and World War II claims were asserted against

German companies as a precondition to allowing the German Foundation to make payments to victims.

There are at least four reasons why, at the time of the respective creations of the German Foundation and GSF, the President of the United States concluded that it would be in the United States' foreign policy interests for the funds to be the exclusive forum and remedy for all Nazi-era property claims against German and Austrian companies. These United States foreign policy interests continue to favor dismissal of Nazi-era property claims against German and Austrian companies such as Erste Group and MKB Bank.<sup>9</sup>

First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era (who are elderly and are dying at an accelerated rate) in their lifetimes. Ex. 2 ¶ 29; Ex. 7 ¶ 30; Ex. 8 ¶ 4. As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation. The GSF, the Reconciliation Fund, and the German Foundation exemplify how such cooperation can lead to a positive result. The GSF and German Foundation provided benefits to more victims, and did so faster and with less uncertainty than litigation would have. They employed more relaxed standards of proof than those applied in litigation, and afforded access to those with Nazi-era property claims against existing and defunct companies. But such comprehensive relief was only possible because of the expectation that those who participated in funding the GSF and the German Foundation would receive legal closure in exchange.

---

<sup>9</sup> As noted above, although MKB Bank is a Hungarian bank, it qualifies as a "German Company" as that term is defined in the German Agreement. Similarly, there is no question that Erste Bank is an "Austrian Company" as that term is defined in the Austrian Agreement.

Indeed, although the agreements at issue were not “settlements” in name, the Austrian and German governments and Austrian and German companies insisted on dismissal of then-pending Nazi-era claims against them as a precondition to allowing the GSF and the German Fund to make payments to victims. Ex. 2 ¶ 37; Ex. 3 ¶ 11; Ex. 7 ¶ 38; Ex. 8 ¶ 10.<sup>10</sup> It is in the enduring and high interest of the United States to vindicate these fora by supporting efforts to achieve dismissal of (i.e., legal closure for) Nazi-era claims against German and Austrian companies. Ex. 3 ¶ 2; Ex. 8 ¶ 2.

Second, establishment of the GSF and the German Fund served to strengthen the ties between the United States and our democratic allies and trading partners, Austria and Germany. *See* Ex. 2 ¶ 33; Ex. 3 ¶ 4; Ex. 7 ¶ 34; Ex. 8 ¶ 5. One of the most important reasons the United States took such an active role in facilitating a resolution of the issues raised in this litigation is that it was asked by the German and Austrian Governments to work as a partner in helping to make the German Foundation, the Reconciliation Fund, and the GSF initiatives successful. Ex. 2 ¶ 33; Ex. 3 ¶ 10; Ex. 7 ¶ 34; Ex. 8 ¶ 9. Since 1945, the United States has sought to work with Austria and Germany to address the consequences of the Nazi era and World War II through political and governmental acts, beginning with the first compensation and restitution laws in post-war Austria that were passed during the Allied occupation. Ex. 2 ¶ 33; Ex. 7 ¶ 34. In recent years, Austrian-American and German-American cooperation on these and other issues has continued, and the joint efforts to develop the German Foundation, the Reconciliation Fund, and

---

<sup>10</sup> Exhibits 3 and 8 are statements issued by then-Secretary of State Madeleine Albright in October 2000 and January 2001. The United States foreign policy interests described in these statements endure to this day. *See* Ex. 1 ¶ 3; Ex. 6 ¶ 3.

the GSF have helped solidify these close relationships. Ex. 2 ¶ 33; Ex. 3 ¶ 4; Ex. 7 ¶ 34; Ex. 8 ¶¶ 5, 6.

Austria is an important factor to the prosperity of Europe, and particularly the new democracies of Central and Eastern Europe. Ex. 7 ¶ 35. Austria has worked with the United States in promoting democracy for decades, and is instrumental to the economic development of Central and Eastern Europe. *Id.*; Ex. 8 ¶ 5. As a member of the European Union, Austria has supported integration of the European Union as well as efforts to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. *Id.* Our continued cooperation with Austria is important to helping achieve these United States interests. *Id.* The “legal closure” that Austria sought from the United States is important to the continued success of this important foreign policy relationship.

Similarly, Germany today is a key to the security and prosperity of the broader North Atlantic community. Ex. 2 ¶ 34. Germany has been a partner of the United States in promoting and defending democracy for more than half a century, and is vital to both the security and economic development of Europe. *Id.* Germany has been a leader in efforts to create stability in Europe through expansion of NATO to include the former communist countries of Central Europe, and through the building of bridges between NATO and Russia. *Id.* Germany has also been a leader in supporting integration of the European Union, and in the effort to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. *Id.* Our continued partnership with Germany is important to helping achieve these United States interests. *Id.*

Third, the German Foundation, the Reconciliation Fund, and the GSF furthered the United States' interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, from which many of those who suffered during the Nazi era and World War II come. Ex. 2 ¶ 35; Ex. 7 ¶ 36.

And, fourth, the German Foundation, the GSF, and the Reconciliation Fund, are the fulfillment of a half-century effort to complete the task of bringing a measure of justice to victims of the Nazi era. "It is in the foreign policy interests of the United States to take steps to address the consequences of the Nazi era, to learn the lessons of, and teach the world about, this dark chapter in European history and to seek to ensure that it never happens again." Ex. 3 ¶ 9; Ex. 8 ¶ 4; *accord* Ex. 4 ¶ 3; Ex. 9 ¶ 3. Although no amount of money will ever be enough to make up for Nazi-era atrocities, the Austrian and German governments have created compensation, restitution, and other benefit programs for Nazi-era acts that have resulted in significant payments to a large number of victims. Ex. 2 ¶ 38; Ex. 4 ¶¶ 3-4; Ex. 7 ¶ 39; Ex. 9 ¶ 3.

These United States foreign policy interests are enduring and apply to this litigation. In the words of William Burns, the current Under Secretary of State for Political Affairs:

The foreign policy interests in 'legal peace' for covered companies described by Secretary Albright and Deputy Secretary Eizenstat [in Exhibits 2, 3, 7, and 8] are enduring and extend beyond [Germany and Austria's] successful implementation of [the respective agreements]. The United States' efforts to facilitate this cooperative compensation arrangement are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, in their lifetimes, as well as to support a broad 'legal peace' for countries and companies subject to ongoing claims.

Ex. 1 ¶ 3; Ex. 6 ¶ 3.

Similarly, Douglas Davidson, the Department of State's Special Envoy for Holocaust Issues, states:

The United States' view is that its long-standing, and ongoing, pursuit of cooperative compensation arrangements with [Germany, Austria] and other governments has achieved justice for the greatest numbers of Holocaust victims, survivors and heirs. Going forward, the United States is focusing its efforts in this regard on the new democracies of Central and Eastern Europe where the preponderance of Europe's Jewish population once lived. It is important to these ongoing efforts that the United States fully perform its obligations by supporting efforts to achieve dismissal of (i.e., "legal peace" for) all claims against [Austrian and German] companies covered by the [respective agreements].

Ex. 4 ¶ 5; Ex. 9 ¶ 5.

For the reasons stated by Under Secretary Burns and Special Envoy Davidson, while the United States takes no position on the underlying legal merits of the claims and defenses advanced by the parties in this case, it would be in the foreign policy interests of the United States for the claims against Erste Group Bank and MKB Bank to be dismissed on any valid legal ground(s). *Cf. Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 n.14 (11th Cir. 2004) (addressing a similar Statement of Interest filed by the United States and holding that "the executive's statements of national interest in issues affecting our foreign relations are entitled to deference" (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004))).

**CONCLUSION**

For the reasons stated above, United States foreign policy interests counsel in favor of dismissal of all claims against Erste Group and MKB Bank on any valid legal ground(s).

February 18, 2010

Of Counsel:

HAROLD HONGJU KOH  
Legal Adviser

BRIAN ISRAEL  
Attorney  
United States Department of State

Respectfully submitted,

TONY WEST  
Assistant Attorney General

PATRICK J. FITZGERALD  
United States Attorney

VINCENT M. GARVEY  
Deputy Branch Director

/s/ Jeffrey M. Smith  
JEFFREY M. SMITH  
Senior Counsel  
United States Department of Justice  
Civil Division  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20530  
Tel: (202) 514-5751  
Fax: (202) 616-8202

*Counsel for the United States*